

interviewers and investigators⁴⁴ and medical personnel.⁴⁵ Factors that post-*Davis* decisions have cited when determining that particular actors were acting as agents of the police include that following:

- the police directed the victim to the interviewer or requested or arranged for the interview;⁴⁶
- the interview was a forensic interview;⁴⁷
- a law enforcement officer observed the interview from another room;⁴⁸
- a law enforcement officer videotaped the interview;⁴⁹
- the person consulted with a prosecution investigator before the interview;⁵⁰
- the person consulted with a law enforcement officer during the interview;⁵¹

⁴⁴. See, e.g., *State v. Blue*, 717 N.W.2d 558, 564 (N.D. 2006) (holding, in part, that “like the 911 operator in *Davis*, we conclude the forensic interviewer in this case was either acting in concert with or as an agent of the government”).

⁴⁵. See, e.g., *Medina v. State*, 143 P.3d 471 (Nev. 2006) (SANE nurse was a “police operative”), *petition for cert. filed* (Nov 17, 2006); *State v. Hooper*, __ P.3d __, 2006 WL 2328233 (Idaho App., Aug. 11, 2006) (Sexual Trauma Abuse Response nurse was acting “in concert with or at the behest of the police”), *review granted* (Jan. 18, 2007).

⁴⁶. See *Hooper*, __ P.3d __, 2006 WL 2328233 (police directed victim’s mother to take child victim to Sexual Trauma Abuse Response Center, where child was interviewed); *People v. Sharp*, __ P.3d __, 2006 WL 3635393 (Col App. Dec. 14, 2006) (police detective arranged for interview); *State v. Krasky*, 721 N.W.2d 916 (Minn. Ct. App. 2006) (interview was at the request of a child protection worker and investigating officer), *review granted* (Dec. 20, 2006).

⁴⁷. See *State v. Justus*, 205 S.W.3d 872 (Mo. 2006) (child was referred to interviewer for a “forensic interview”); *Hooper*, __ P.3d __, 2006 WL 2328233 (interviewing nurse described herself as a “forensic interviewer and sexual assault nurse examiner”); *Medina*, 143 P.3d 471 (nurse testified that she was a “forensics nurse”).

⁴⁸. See *Blue*, 717 N.W. 2d 558; *Hooper*, __ P.3d __, 2006 WL 2328233; *Sharp*, __ P.3d __, 2006 WL 3635393.

⁴⁹. See *State v. Pitt*, 147 P.3d 940 (Or. App. 2006).

⁵⁰. See *State v. Buda*, 912 A.2d 735 (N.J. Super. 2006).

- the person asked questions at the behest of a law enforcement officer;⁵²
- the purpose of the interview was to further a criminal investigation;⁵³
- the lack of a non-law enforcement purpose to the interview;⁵⁴ and
- the fact that law enforcement was provided with a videotape of the interview after the interview concluded.⁵⁵

• **How much formality is required in order for the statement to be testimonial?**

As noted above, *Davis* concluded that although the confrontation clause’s protections covered more than statements of the most formal sort, “formality is indeed essential to testimonial utterance.”⁵⁶ And as noted, it found that statements to the police always have the requisite level of formality because criminal consequence attach to false statements to officers. These conclusions provide little guidance as to the level of formality that will be required of statements given outside of the context of police interrogations.

⁵¹. See *Hooper*, __ P.3d __, 2006 WL 2328233; *Sharp*, __ P.3d __, 2006 WL 3635393.

⁵². See *Hooper*, __ P.3d __, 2006 WL 2328233; *Sharp*, __ P.3d __, 2006 WL 3635393.

⁵³. See *Pitt*, 147 P.3d 940 (interview was conducted for the express purpose of furthering a police investigation); *Sharp*, __ P.3d __, 2006 WL 3635393; *State v. Krasky*, 721 N.W.2d 916 (Minn. Ct. App. 2006) (child protection worker and investigating officer determined that the interview was “the best way to proceed with the investigation”); see also *Buda*, 912 A.2d 735 (Department of Youth and Family Services worker was called to the hospital to conduct and investigation because the examining physician suspected wrongdoing).

⁵⁴. See *Hooper*, __ P.3d __, 2006 WL 2328233 (court notes that there was no evidence that the interview had a diagnostic, therapeutic, or medical purpose); *Krasky*, 721 N.W.2d 916 (court notes that there was no identified medical reason for the interview).

⁵⁵. See *State v. Blue*, 717 N.W. 2d 558 (N.D. 2006); *Krasky*, 721 N.W.2d 916.

⁵⁶. *Davis*, 126 S. Ct. at 2278 n.5.